No. 17-1107

In the Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN, PETITIONER

v.

PATRICK DWAYNE MURPHY

(CAPITAL CASE)

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUPPLEMENTAL REPLY BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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TABLE OF CONTENTS

Page

I. Oklahoma has jurisdiction over respondent's crime, regardless of the reservation status of land within the Creek Nation's 1866 territorial boundaries 2
II. The Creek Nation's former territory is not "under the jurisdiction of the United States government" 9

TABLE OF AUTHORITIES

Cases:

Higgins v. *Brown*, 94 P. 703 (Okla. 1908) 3, 4, 5
Jefferson v. *Fink*, 247 U.S. 288 (1918) 4
Joplin Mercantile Co. v. *United States*, 236 U.S. 531 (1915) 10, 11
Perrin v. *United States*, 232 U.S. 478 (1914) 10
Russello v. *United States*, 464 U.S. 16 (1983) 7
State v. *Klindt*, 782 P. 2d 401 (Okla. Crim. App. 1989) 9
United States v. *Mazurie*, 419 U.S. 544 (1975) 10
United States v. *Nice*, 241 U.S. 591 (1916) 10
United States v. *Ramsey*, 271 U.S. 467 (1926) 4
United States Express Co. v. *Friedman*, 191 F. 673 (8th Cir. 1911) 10
Webb, Ex parte, 225 U.S. 663 (1912) 10
Whitman v. *American Trucking Ass'ns*, 531 U.S. 457 (2001) 5

Constitution and statutes:

Okla. Const. Art. I, § 3 7
Act of Mar. 1, 1895, ch. 145, § 8, 28 Stat. 697 10
Act of June 7, 1897 (Indian Department Appropriations Act), ch. 3, 30 Stat. 83 2

Statutes—Continued: Page

Act of Mar. 1, 1901, ch. 676, § 42, 31 Stat. 872 11
Act of Apr. 30, 1908, ch. 153, 35 Stat. 70:
35 Stat. 71 12
35 Stat. 91 11
Act of Mar. 3, 1909, ch. 263, 35 Stat. 805 11
Act of Mar. 5, 1934, ch. 43, 48 Stat. 396 10
Indian Major Crimes Act, 18 U.S.C. 1153(a) (Supp. V 2017) 9
Oklahoma Enabling Act of June 16, 1906, ch. 3335, 34 Stat. 267 2
§ 1, 34 Stat. 267-268 5
§ 3, 34 Stat. 270 ..... 6, 7
§ 13, 34 Stat. 275 5
§ 16, 34 Stat. 276, as amended by Act of Mar. 4, 1907, ch. 2911, 34 Stat. 1286-1287 3
§ 21, 34 Stat. 278 5
§ 25, 34 Stat. 279 7
Rev. Stat. (1875):
§ 2145 4
§ 2146 4
18 U.S.C. 1151(a) 9
18 U.S.C. 1151(c) 9
28 U.S.C. 2254 8

Miscellaneous:

Cohen's Handbook of Federal Indian Law (Nell Jessup Newton et al. eds., 2012 ed.) 7
Felix S. Cohen, *Handbook of Federal Indian Law* (1942) 10
H.R. Rep. No. 715, 73d Cong., 2d Sess. (1934) 10
H.R. Rep. No. 1188, 56th Cong., 1st Sess. (1900) 3

Miscellaneous—Continued: Page

Jurisdiction on Indian Reservations: Hearings on S. 1181, S. 1722, and S. 2832 Before the Senate Comm. on Indian Affairs, 96th Cong., 2d Sess. (1980) 7

Report of the Commissioner of Indian Affairs:

(1907) 11

(1908) 12

S. Rep. No. 278, 60th Cong., 1st Sess. (1908) 12

S. Rep. No. 699, 83d Cong., 1st Sess. (1953) 6

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Congress disestablished the Creek Nation's historic territory though a series of statutes—enacted between 1890 and statehood in 1907—that, *inter alia*, broke up and allotted nearly all of the Creek Nation's lands, abolished its courts, and greatly circumscribed its governmental authority. Gov't Amicus Br. 6-18. Through those statutes, Congress eliminated distinctions between Indians and non-Indians in preparation for replacing the tribal domains and governmental authority of the Five Tribes with those of a new State. In particular, Congress subjected Indians and non-Indians in the Indian Territory to the same criminal (and civil) laws and prosecution in the same courts. *Id.* at 28-31; Gov't Supp. Br. 4-10.

Respondent and the Creek Nation do not dispute that prior to statehood, Indians in the Indian Territory

were made subject to the same criminal laws and court jurisdiction as non-Indians, who already greatly outnumbered Indians there. Instead, they posit that by admitting Oklahoma to statehood, Congress *sub silentio* reestablished the very jurisdictional distinctions between Indians and non-Indians it had spent the prior two decades eliminating in preparation for statehood. But neither the Oklahoma Enabling Act of June 16, 1906, 34 Stat. 267, nor any subsequent statute rescinded the preexisting jurisdictional framework. To the contrary, the Enabling Act transferred general criminal jurisdiction over Indians and non-Indians alike to the State. The sea change respondent and the Creek Nation hypothesize went unnoticed by federal and state prosecutors, the courts, and defendants for 111 years. Their argument now would undo more than a century of considered practice by the state and federal governments and create significant uncertainty with respect to both criminal and civil jurisdiction. It should be rejected.

I. OKLAHOMA HAS JURISDICTION OVER RESPONDENT'S CRIME, REGARDLESS OF THE RESERVATION STATUS OF LAND WITHIN THE CREEK NATION'S 1866 TERRITORIAL BOUNDARIES

1. Respondent and the Creek Nation do not dispute that prior to statehood, Congress subjected Indians and non-Indians in the Indian Territory to the same criminal laws and court jurisdiction, "irrespective of race," Act of June 7, 1897, 30 Stat. 83. Instead, they suggest that action was insignificant because the "body of law" applicable to both groups—federal law and "incorporated Arkansas law"—was "federal in character." Creek Nation (Creek) Supp. Br. 4-5.

That misses the critical point: by subjecting Indians to the same laws as non-Indians, abolishing tribal

courts, and providing for cases involving Indians to be tried in the Court for the Indian Territory, Congress enacted into law "[t]he policy of the Government to abolish classes in Indian Territory and make a homogenous population." H.R. Rep. No. 1188, 56th Cong., 1st Sess. 1 (1900). Congress thus "removed the essential characteristic of the Indian country"—"the application of tribal laws within the area"—and "superseded" the Indian Major Crimes Act and General Crimes Act there. Gov't Amicus Br. App. 3a; see *Higgins* v. *Brown*, 94 P. 703, 725-727 (Okla. 1908).

2. Thus, by the eve of statehood, non-Indians lived among and greatly outnumbered Indians, and Congress therefore had placed Indians and non-Indians on the same footing with respect to criminal law and jurisdiction. Respondent and the Creek Nation must identify some congressional action altering that status quo. The Enabling Act did not reinstate criminal-law distinctions between Indians and non-Indians that Congress had eliminated specifically in preparation for statehood. It instead extended a uniform body of Oklahoma law in place of Arkansas law over *all* the inhabitants of the former Indian Territory and transferred *all* criminal cases of a local nature there—including those involving Indians—to the new state courts. Gov't Supp. Br. 10-12.

a. Respondent and the Creek Nation suggest that under the Enabling Act, crimes involving Indians should have been tried in federal court, because they arose "under the Constitution, laws, or treaties of the United States." Creek Supp. Br. 7 (quoting Enabling Act § 16, 34 Stat. 276); see Resp. Br. 45. That argument ignores the contemporaneous and century-long practice of federal and state courts and prosecutors. Gov't Supp.

Br. 12-14. And it assumes that the Major Crimes Act and General Crimes Act—which had been superseded in the Indian Territory—sprang back to life at statehood, even though Congress enacted no language to that effect.[1] Moreover, those statutes would not have provided federal jurisdiction over crimes between Indians not enumerated in the Major Crimes Act. See Rev. Stat. §§ 2145, 2146 (1875). Because the tribal courts remained abolished, respondent and the Creek Nation assume that Congress—though long concerned with law-and-order in the Indian Territory—left *no* court with jurisdiction over such crimes. Gov't Supp. Br. 4-7, 14 & n.3.

The argument that cases involving Indians remained "federal" in nature, because Arkansas law applied to them as incorporated federal law, see Resp. Supp. Br. 10-11; Creek Supp. Br. 5, proves too much. Congress similarly applied incorporated Arkansas law to non-Indians in the Indian Territory; no one suggests that all criminal cases involving those individuals were "federal," too. See *Higgins*, 94 P. at 723; cf. *Jefferson* v. *Fink*, 247 U.S. 288, 290-291 (1918). Indeed, had Congress intended for all criminal cases in the Indian Territory to be transferred to federal court, it would not have amended the Enabling Act in 1907. See Gov't Supp. Br. 11-12.

Respondent relies on the 1907 amendment's statement that prosecutions for offenses "which, had they

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[1] Citing *United States* v. *Ramsey*, 271 U.S. 467 (1926), respondent contends (Supp. Br. 7) that the General Crimes Act applied throughout eastern Oklahoma following statehood. But *Ramsey* concerned a restricted allotment in the former Oklahoma Territory, not fee land in the former Indian Territory. 217 U.S. at 468-469.

been committed within a State, would have been cognizable in the Federal courts," should be tried there. Resp. Supp. Br. 8 (emphasis omitted). That language referred to crimes committed in discrete federal enclaves such as forts or arsenals, Gov't Supp. Br. 12-13, not in the entirety of the former Indian Territory that Congress had abolished. It mandated "applying the hypothetical existence of a state to a region that was specifically a territory and subject to special laws as such." *Higgins*, 94 P. at 724. Because "special laws" subjected Indians and non-Indians in the Indian Territory to the same laws and court jurisdiction for crimes of a local nature, such crimes were to be prosecuted "in the state courts as successors" to the Indian Territory courts "in their local capacity." *Id.* at 724-725.

b. No other Enabling Act provision suggests that Congress revived jurisdictional distinctions between Indians and non-Indians at statehood. Respondent observes (Supp. Br. 8-10) that Section 13 extended the laws of the Oklahoma Territory "as far as applicable," 34 Stat. 275, and Section 21 applied the "laws of the United States not locally inapplicable" to the new State, 34 Stat. 278. But even assuming that Congress viewed all the former Indian Territory as reservations in some sense, that statutory language would be an extremely oblique way to reinstate long-eliminated jurisdictional distinctions throughout that vast area. See *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress "does not * * * hide elephants in mouseholes."). And it would not address non-major crimes between Indians.

Nor did Section 1 of the Enabling Act enact such a transformation; it merely preserved *existing* federal laws and power over Indians and their lands, 34 Stat.

267-268—not over fee lands in the former Indian Territory, such as those at issue here, over which there was and is no federal or tribal Indian-country jurisdiction. So too for Section 3, which provides that the State has no claim to any "right and title" to Indian lands. 34 Stat. 270. Had the Enabling Act required that crimes by or against Indians throughout eastern Oklahoma be tried in federal court, one would expect that at least one Member of Congress would have objected since, for the next century, Oklahoma prosecuted those cases. Yet respondent and the Creek Nation do not identify even a mention of that possibility.

3. Because Oklahoma *already* had jurisdiction over crimes involving Indians in eastern Oklahoma, there was no need for Congress subsequently to grant such jurisdiction to the State, or for Oklahoma to obtain it under Public Law 280.[2] The legislative history of Public Law 280 does not suggest otherwise. The Senate Report's identification of Oklahoma as one of eight States that needed to amend its Constitution to "assume" criminal jurisdiction did not speak to jurisdiction the State already possessed or specifically address the part of the State comprising the former Indian Territory. S. Rep. No. 699, 83d Cong., 1st Sess. 7 (1953). Nor did it correctly describe the Enabling Act, which did not provide for Congress to maintain "absolute jurisdiction and control" over all Indian lands in Oklahoma. *Ibid.* While the Enabling Act contains such a provision

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[2] Respondent notes the Interior Department's 1963 statement that Oklahoma exercised criminal jurisdiction although it "do[es] not have such jurisdiction under a specific Federal statute." Supp. Br. 14 (quoting Gov't Amicus Br. App. 8a). That statement focused on restricted allotments in the former Oklahoma Territory, not fee land in the former Indian Territory. Gov't Amicus Br. App. 4a, 8a-9a.

regarding another potential State, § 25, 34 Stat. 279, it required Oklahoma to "forever disclaim all right and title" to public and Indian lands, but mandated continued federal jurisdiction only over public lands, § 3, 34 Stat. 270; see Okla. Const. Art. I, § 3; see, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983). And a later compilation for the Senate Judiciary Committee stated that Oklahoma has jurisdiction over crimes involving Indians "pursuant to various Federal statutes." *Jurisdiction on Indian Reservations: Hearings on S. 1181, S. 1722, and S. 2832 Before the Senate Comm. on Indian Affairs*, 96th Cong., 2d Sess. 30, 34 (1980).

4. The Creek Nation effectively acknowledges (Supp. Br. 9) that affirmance would constitute a sea change by "committ[ing] to consummat[e] appropriate jurisdictional agreements" under Public Law 280. That ignores the enormity of the task. Since 1968, state assumptions of jurisdiction under Public Law 280 have required Indian consent by majority vote; in the intervening half-century, "[o]nly one state acceptance has occurred * * * , and no tribes in that state have consented to the state's jurisdiction." *Cohen's Handbook of Federal Indian Law* § 6.04[3][a], at 538 (Nell Jessup Newton et al. eds., 2012 ed.). Even if the Creek Nation could ensure the consent of its members, that would leave the others of the Five Tribes, for which no one has identified a material difference regarding reservation status.

The Creek Nation's assurances also could not reinstate the many state convictions that affirmance would imperil. While respondent and the Creek Nation suggest that the United States may retry defendants whose state convictions are vacated, they ignore statutes of

limitations, stale evidence, impacts on victims, and limited federal resources. Nor do state and federal habeas defenses necessarily solve the problem. Oklahoma does not share the Creek Nation's optimism that the State has meritorious defenses to state habeas relief, 11/27/18 Oral Arg. Tr. 76; if Oklahoma is correct, the availability of relief under 28 U.S.C. 2254—which, at a minimum, would yield significant litigation—is irrelevant.

It is similarly inadequate to suggest that Congress may simply "pass legislation specifically altering the jurisdictional balance." Creek Supp. Br. 10. Affirmance of the Tenth Circuit's ruling that there is a present-day Creek Reservation over which the State lacks criminal jurisdiction would dramatically alter the status quo. At the same time, reversal on the ground that the State retained jurisdiction over respondent's crime, regardless of reservation status, would yield many open questions and encourage challenges to federal convictions, obtained since the early 1990s, for crimes occurring on restricted allotments. See Pet. Supp. Br. 13-17. Those issues would be difficult to resolve through legislation alone. This Court should not leave it to Congress to enact Oklahoma-specific fixes (where possible) for each particular disruption. It should recognize that Congress *already* has spoken by abolishing the Creek Nation's former territory. Such a ruling would preserve the status quo governing eastern Oklahoma for more than a century (and, with respect to restricted allotments, since the early 1990s). Gov't Supp. Br. 18 n.5; Pet. Supp. Br. 8-12.

II. THE CREEK NATION'S FORMER TERRITORY IS NOT "UNDER THE JURISDICTION OF THE UNITED STATES GOVERNMENT"

1. All agree there are no circumstances relevant here in which land constitutes a federal reservation but does not qualify as "Indian country" under 18 U.S.C. 1151(a). Gov't Supp. Br. 18-19; Pet. Supp. Br. 17-18; Resp. Supp. Br. 16-21; Creek Supp. Br. 14-20. As the United States has explained, however (Supp. Br. 19-21), the Major Crimes Act's reference, since 1948, to "Indian country," 18 U.S.C. 1153(a), does not suggest that Congress intended implicitly to replace the more specific jurisdictional framework governing eastern Oklahoma with exclusive federal jurisdiction over major crimes committed by Indians throughout that area.[3]

2. Respondent (Supp. Br. 21-23) and the Creek Nation (Supp. Br. 21-25) contend that before and after statehood, Congress exercised jurisdiction over a "Creek reservation." None of their assertions suggests that the United States has exclusive jurisdiction over crimes involving Indians throughout the Creek Nation's former territory, or that it constitutes a present-day reservation where the United States has jurisdiction over vast amounts of fee lands.

a. Respondent and the Creek Nation focus on federal supervision over liquor transactions. Such federal power is derived not from reservation status, but "from various sources," including "the treaty-making power,"

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[3] The same is not necessarily true of remaining restricted allotments. Cf. *State* v. *Klindt*, 782 P. 2d 401, 403 (Okla. Crim. App. 1989) (holding that Oklahoma lacks jurisdiction over crimes committed on such lands based on Congress's 1948 codification of the definition of "Indian country" to include "all Indian allotments, the Indian titles to which have not been extinguished," 18 U.S.C. 1151(c)).

"the power to regulate commerce with the Indian tribes," and "the plenary authority arising out of its guardianship of the Indians." *United States Express Co.* v. *Friedman*, 191 F. 673, 674 (8th Cir. 1911); see *United States* v. *Nice*, 241 U.S. 591, 597 (1916); *Ex parte Webb*, 225 U.S. 663, 683-684 (1912); Felix S. Cohen, *Handbook of Federal Indian Law* § 2, at 352-353 (1942) (Cohen 1942). Agreements with each of the Five Tribes required the maintenance of federal liquor prohibitions. *Webb*, 225 U.S. at 685. And Congress more generally maintains "[t]he power * * * to prohibit traffic in [intoxicating] liquors with tribal Indians, whether upon or off a reservation." *Perrin* v. *United States*, 232 U.S. 478, 482 (1914); see, *e.g.*, *United States* v. *Mazurie*, 419 U.S. 544, 554 (1975); Cohen 1942 § 3, at 354 & n.38.[4]

Joplin Mercantile Co. v. *United States*, 236 U.S. 531 (1915), is not to the contrary. The federal indictment there referenced the City of Tulsa as "formerly within and * * * now a part of what is known as the Indian country." *Id.* at 535. But given the indictment's wording, the reference to "Indian country"—which was not yet a statutorily defined term—arguably, if inartfully, referred to *all* of the former Indian Territory, which was subject to an 1895 liquor prohibition. Gov't Br. 9-10, *Joplin*, *supra* (No. 648); see Act of Mar. 1, 1895, § 8, 28 Stat. 697; *Joplin*, 236 U.S. at 536-537. Moreover, in this Court, the United States did not contend that Tulsa constituted "Indian country" after fee patents issued. Instead, it argued—and this Court held—that the

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[4] When Congress repealed liquor prohibitions in the former Indian Territory, Act of Mar. 5, 1934, 48 Stat. 396, the Assistant Attorney General stated that "there are no Indian reservations in the technical sense" in that area. H.R. Rep. No. 715, 73d Cong., 2d Sess. 2 (1934).

indictment sufficiently alleged a conspiracy to introduce liquor into "other parts and portions of that part of Oklahoma which lies within the Indian country." *Joplin*, 236 U.S. at 548; see Gov't *Joplin* Br. 10-12; Gov't *Joplin* Br. in Opp. 5.

b. Respondent and the Creek Nation also rely on the Original Creek Agreement, which permitted the Creek legislature to pass laws "affecting the lands of the tribe, or of individuals after allotment, or the moneys or other property of the tribe, or of the citizens thereof," if "approved by the President of the United States." Act of Mar. 1, 1901, § 42, 31 Stat. 872. But that *limitation* on Creek authority even over *Indian lands* undermines rather than supports the proposition that the Creek Nation (and the United States) maintained authority over non-Indian or other unrestricted *fee lands*—the only lands at issue here.

c. The Act of Mar. 3, 1909, 35 Stat. 805, embodied congressional measures to *wind down* supervision over allotments. It provided that the United States would pay allottees out of the Creek Nation's *own funds* as "a final and conclusive settlement of all claims for the equalization of allotments," and that, as a "condition precedent" to such payments, the Creek legislature would "discharg[e] the United States from all claim and demand on this account." *Ibid.*

d. Finally, federal funding for tribal schools does not suggest continued reservation status. Such funding was "highly necessary" because much of the land in the area was not yet subject to state taxation. *Report of the Commissioner of Indian Affairs* 96 (1907). Further federal funding "prov[ided] for the attendance of children of parents of other than Indian blood," Act of Apr. 30, 1908 (1908 Act), 35 Stat. 91, who, by 1908, comprised

84% of the pupils, *Report of the Commissioner of Indian Affairs* 105 (1908). The "central idea" remained "an early transition from the United States Government to state control." *Id.* at 104; see S. Rep. No. 278, 60th Cong., 1st Sess. 7 (1908). To that end, the 1908 Act required the Interior Department to take possession of all school buildings and furniture "and appraise and sell the same," 35 Stat. 71—hardly the language of a continuing reservation.

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The judgment of the court of appeals should be reversed.

Respectfully submitted.

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